Supreme Court, U.S.
FILED
JUN 20 1998
OFFICE OF THE CLERK

No. 97-2052

In The

Supreme Court of the United States

October Term, 1997

PETROLEUM HELICOPTERS, INC.,

Petitioner,

vs.

MITCHEL BURAS,

Respondent.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ST. MARTIN & WILLIAMS
MICHAEL X. ST. MARTIN
3373 Little Bayou Black Drive
P.O. Box 2017
Houma, Louisiana 70361-2017
(504) 876-3891

PHILIP F. COSSICH, JR.
Counsel of Record
DARREN D. SUMICH
COSSICH, MARTIN
& SUMICH, L.L.C.
8056 Highway 23, Suite 200
P.O. Box 400
Belle Chasse, Louisiana 70037
(504) 394-9000

Attorneys for Respondent

147449

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

TABLE OF CONTENTS

	Page
Introduction	1
Factual Background	3
Law and Argument	7
Conclusion	15

TABLE OF CITATIONS

Cases Cited:

Dean v. Traveller's Insurance Co., 171 So. 2d 708 (La. App. 1965). (Emphasis added)	10
Employer Insurance of Wausau v. Sawanee River Spa, L. 866 F.2d 752 (5th Cir. 1989)	9, 14
Esso Standard Oil, S.A. v. S.S. Gasbras Sul, 387 F.2d 573 (2d Cir. 1967), *cert. denied*, 391 U.S. 914 (S. Ct. 1808), 20 L. Ed. 2d 653 (1968). (Emphasis added)	9
Hickman v. Southern Pacific Transport Co., 262 La. 102 So. 2d 385 (1972)	9
Martin v. City of New Orleans, 678 F.2d 1321 (5th Cir. 1982	10
Rosell v. ESCO, 549 So. 2d 840 (La. 1989), *on remand*, 558 So. 2d 1360, *writ denied*, 561 So. 2d 105	7

Contents

Page

Union Oil Co. of California v. Tug Mary Malloy, 414 F.2d 669 (5th 1969). (Emphasis added) 10

Other Authority Cited:

W. Prosser, *Law of Torts*, Chap. 5, S. 33 (1971) 10

INTRODUCTION

On September 20, 1988, a helicopter owned by Petroleum Helicopters, Inc. ("PHI") and piloted by PHI employee George Talley sustained engine damage while flying over the Gulf of Mexico when a bird was ingested into the aircraft's turbine engine. Rather than making an immediate and proper precautionary landing, Talley attempted to stretch the flight out and continue onward to his original destination, an offshore oil platform. Mitchell Buras ("Buras"), a passenger aboard the helicopter, sustained severe physical, mental and emotional injuries when Talley slammed the helicopter onto the offshore oil platform.

Buras' case against PHI was tried before the honorable William A. Roe of the Twenty-Fifth Judicial District Court for the Parish of Plaquemines, State of Louisiana. Judge Roe found PHI and Talley liable for the accident and the resultant injuries to Buras in an extensive and well reasoned 26 page decision.

PHI was displeased with the trial court for rejecting its version of the facts and appealed to the Louisiana Court of Appeal for the Fourth Circuit. The case was fully briefed and argued to the Court of Appeal and, in another extensive and well reasoned decision, the Court of Appeal affirmed the trial court and rejected the "spin" that PHI attempted to put on the facts.

Dissatisfied yet again, PHI filed a writ application with the Louisiana Supreme Court. Realizing the hopelessness in showing manifest error in the trial court's factual findings, especially as affirmed by the Court of Appeal, PHI attempted to cloak its dissatisfaction with the findings of fact as an assignment of legal error. The Louisiana Supreme Court denied PHI's writ application.

PHI's response was to petition this honorable Court for a writ of certiorari to review these decisions. Buras has filed the instant memorandum in opposition to this writ application.

In its writ application, PHI attempts to convince this honorable Court that the trial court, as well as the Court of Appeal, committed the legal error of failing to apply the standard of care for emergency situations established by the general maritime law. However, the trial court's ruling was made with a full understanding of the "sudden emergency" doctrine. The trial court found PHI liable because the pilot's actions were unreasonable under the circumstances, a factual conclusion that supports holding PHI liable even under the "sudden emergency" doctrine. Furthermore, the decision of the Court of Appeal was also made with a full understanding of the "sudden emergency" doctrine. The Court of Appeal specifically acknowledged that the record contained ample evidence to support Judge Roe's factual conclusions. A review of the evidence, Judge Roe's written reasons for judgment, and the decision of the Court of Appeal clearly show that both decisions are sound.

In truth, the picture that PHI now paints for this honorable Court is not the same as seen by Judge Roe. The evidence at trial showed a reckless helicopter pilot that took a risk and lost. The pilot was faced with several options; but, as the evidence showed, and as Judge Roe heard, he chose the most dangerous and an unreasonable option, the one that would save his employer's helicopter. He "stretched" the flight to his original destination — a platform four to five miles away, a decision that Judge Roe found to be unreasonable under the circumstances.

The safe option would have been to set the helicopter down on its floatational devices in the calm waters of the Gulf as it was designed and equipped to do. However, this would have

cost his employer more money in retrieval and repair costs. Moreover, the pilot was not wearing a life vest as mandated by company regulations, influencing his ability to make a rational decision. Judge Roe correctly decided that saving the helicopter should not have been an issue to the pilot. The issue was whether PHI and its pilot met their duties to their passengers. No court can properly conclude that the well-being of a helicopter is more important than the well-being of its passengers. Nevertheless, this is what PHI requested.

In asking this honorable Court to recognize the emergency circumstances under which the pilot was operating, PHI fails to mention that it was the pilot's own choices that elevated the circumstances to a dangerous level. The situation became more dangerous every second the pilot continued to the far away platform. Indeed, with only its last breath of energy did the helicopter slam onto the platform, causing severe injury to Buras. PHI's pilot heightened the emergency, and now PHI wishes to argue that emergency circumstances should lessen its standard of care toward Buras.

This is not the case of a pilot faced with a split second emergency decision. This is a case of a pilot who, despite his training, despite the PHI safety rules, despite the pleadings of his passengers, and despite the dictates of reasonable judgment, made a conscious decision to place the value of his helicopter above that of his passengers and continue on to his original destination.

FACTUAL BACKGROUND

PHI leaves much of the facts and evidence that Judge Roe heard out of its treatment of the case. On the day of the accident, Talley was flying a PHI helicopter from an offshore platform at Main Pass Block 151 to an offshore platform at South Pass

Block 65-B, four to six miles away. He was carrying Buras and another passenger, Mr. Owen Barnes. (R. Vol. 3, pp. 35-36; R. Vol. 4, p. 157). The skies were clear and the seas were calm — "smooth like glass." (R. Vol. 3, pp. 38-39, 61).

About one-half mile after departing the Block 151 platform, the helicopter engine ingested a bird and the turbine out temperature ("TOT") gauge immediately began rising. (R. Vol. 3, pp. 40, 64; R. Vol. 4, p. 73). According to Owen Barnes, the engine began making a "loud screaming noise," over which one could not hear himself talk. Barnes also detected smoke in the helicopter. (R. Vol. 3, p. 63). Buras' testimony corroborates this. (R. Vol. 4, pp. 71, 107). The pilot radioed his dispatcher and declared an emergency; he told the dispatcher about the smoke in the cockpit. (R. Vol. 3, pp. 49, 63). Talley also told the dispatcher that he did not think they were going to make it to the Block 65 platform. Barnes, an experienced helicopter passenger, was continually looking at the helicopter's temperature gauge. He noticed that the engine was getting hotter and hotter. In response, Talley took more and more power away from the engine. (R. Vol. 3, pp. 66, 68). Both passengers pleaded with Talley to set the helicopter down.

Talley admitted that after the bird went into the engine the helicopter was not operating normally. He further admitted that when an aircraft is not operating properly, the PHI emergency procedures manual requires that a precautionary landing be made **immediately**. This is precisely the reason why the helicopter is equipped with pop-out floats, to land and float on water. However, instead of making the safe precautionary landing in the calm Gulf waters below, Talley chose to proceed to his original destination, the South Pass 65 Baker platform. (R. Vol. 3, pp. 42-43, 47, 147). He made this decision despite the fact that he still had approximately five miles to travel to reach this destination.

According to Barnes' description, the helicopter continued to lose power, and approached the landing pad at Block 65 at a speed of about 50 or 60 miles per hour, until it reached a point about three feet from the pad, where it slowed and "slammed" onto the landing pad. (R. Vol. 3, pp. 71-72). Buras agreed: "We came in a very fast landing"; the helicopter hit the platform on the back axle and then came down on the front and slid. (R. Vol. 4, p. 73).

At the time of the accident, Talley was the only person on the helicopter not properly suited for a water landing, since he was not wearing his life vest. (R. Vol. 3, pp. 45-46). PHI vice-president, Vernon Albert, testified that PHI first reprimanded Talley for this practice only about three weeks before trial. (R. Vol. 4, p. 191). Nevertheless, Barnes had flown with Talley in a helicopter about ten days prior to the trial, and at that time, Talley was still not wearing his life preserver as required by PHI rules. (R. Vol. 3, p. 75).

As a result of the incident, the helicopter sustained about $33,500 of damage. (R. Vol. 4, pp. 171-172). The engine was damaged so severely that it was basically replaced while the helicopter was still on the platform at Block 65-B. (R. Vol. 3, p. 119). This extensive damage is still meager in comparison to the $350,000 loss PHI could have sustained had Talley made the landing in the Gulf waters. (R. Vol. 4, pp. 196-197). Talley saved PHI a great deal of money by placing the value of the helicopter over the value of his passengers' safety.

Buras called Michael K. Hynes, a specialist in aviation and aviation education, as an expert witness. Hynes is a designated federal aviation administration ("FAA") examiner and acts on behalf of the FAA in issuing pilot certificates to licensed applicants. He teaches aviation at two universities in Oklahoma. Mr. Hynes' teaching curriculum specifically includes aeronautical

decision making/risk management, both at management and pilot operational levels. Mr. Hynes was qualified by the court as an expert in safe helicopter operation and piloting, state F.A.R. 135 operations, engine failure, accident prevention, and aeronautical decision making and risk taking. (R. Vol. 3, pp. 103-107).

Hynes testified that PHI's pilot safety manual required a "precautionary landing" in the event of engine malfunction so the situation does not turn more serious. According to Hynes, Talley violated this safety rule. Instead of making the mandated precautionary landing in the calm Gulf waters, Talley continued the flight to the platform. (R. Vol. 3, p. 110). Hynes also noted that Talley was in violation of PHI regulations by not wearing his life vest. (R. Vol. 3, p. 112). Hynes specifically testified that immediately after the engine malfunctioned:

> [Talley] . . . was fortunate enough to have an opportunity to use whatever availability the engine still has, and go ahead and make a precautionary landing as soon as possible. Because of the water conditions, he's got a wide open area right behind him. I would have preferred that he go to the water rather than even go to the platform behind him because if you have an engine failure as you are approaching the platform, that puts in another high risk set of equations. The recovery from that event, generally is catastrophe. You are not in the risk taking business. You don't want your passengers buying a chance of safe transportation.

(R. Vol. 3, pp. 113-114).

Hynes concluded that if Talley had made the proper precautionary landing in the water, there should have been no injury to the passengers. (R. Vol. 3, pp. 120-121).

PHI brought an expert witness, Walter Lamon, in from Connecticut to testify at trial. Lamon had previously performed evaluations of PHI's services while working for a customer of PHI, British Petroleum. (R. Vol. 4, pp. 201-202). Lamon admitted that he had never been trained on how to make emergency landings on water with the Bell Model 206 helicopter, the model involved in this incident. (R. Vol. 4, p. 207-208). Like Talley, Lamon was also a former military pilot. While admitting that after the bird was ingested, the helicopter was **no longer air-worthy**, Lamon commended Talley for continuing the flight to the platform at "South West 65 Bravo." Also, when questioned about whether Talley made a proper "precautionary landing" according to PHI regulations, Lamon admitted that the area Talley chose as his "precautionary landing" area was also Talley's final destination for that "sortie." (R. Vol. 4, pp. 219-220, 227).

LAW AND ARGUMENT

A Louisiana court of appeal may not set aside a trial court's findings of fact in the absence of "manifest error" or unless it is "clearly wrong". Where there is conflicting testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed, even though the appellate court may feel that its own evaluations and inferences are just as reasonable. *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989), *on remand*, 558 So. 2d 1360, *writ denied*, 561 So. 2d 105.

Realizing the hopelessness in showing manifest error in the trial court's factual findings, PHI attempts to phrase its argument as an assignment of legal error. It argues that this Court should grant review to resolve the conflict that the Louisiana courts have created by failing to apply the sudden emergency doctrine; that a re-establishment of the applicable standard of care in emergency situations is warranted. This argument lacks merit.

It is obvious from the Louisiana courts' rulings in this matter that they did not reject the "sudden emergency" doctrine as PHI implies. The trial court's ruling and the decision of the Louisiana Fourth Circuit Court of Appeal were made with a full understanding and application of the "sudden emergency" doctrine. **What PHI is truly unhappy with is the way in which this rule of general maritime law was applied to the facts of the instant case. This is insufficient justification for this Court to grant PHI's writ request.**

Neither party disputes that the proper standard of care in this case is "reasonable care under the circumstances." This case involves the issue of whether the pilot exercised "reasonable care under the circumstances of an emergency." The trial court's decision reflects a fundamental understanding that the case involved an emergency, and that the pilot responded to the emergency negligently. The trial court well knew of the emergency circumstances, yet concluded that the pilot still breached the standard of care owing to his passengers. Indeed, the evidence shows that the pilot actually contributed to and compounded the emergency. PHI would have this Court believe that the "sudden emergency" doctrine is a cure all for any act of negligence committed once a dangerous situation is encountered. This is simply not the case.

There is no real conflict between Louisiana law and general maritime law in the "sudden emergency" doctrine. Louisiana law describes the "sudden emergency" doctrine thusly:

> One who suddenly finds himself in a position of imminent peril, without sufficient time to consider and weigh all the circumstances, or best means that may adopted to avoid an impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have

> been a better method, unless the emergency in which he finds himself is brought about by his own negligence.

Hickman v. Southern Pacific Transport Co., 262 La. 102, 262 So. 2d 385, 389 (1972).

In comparison, under the general maritime law the "sudden peril" doctrine provides as follows:

> The master of a vessel caught in an emergency where he is forced to choose between risky alternatives, is entitled to a wide range of discretion in deciding what to do, **provided it is a reasonable exercise of current standards of nautical knowledge and skill under the circumstances**.

Employer Insurance of Wausau v. Sawanee River Spa, L. 866 F.2d 752, 773 (5th Cir. 1989), citing *Esso Standard Oil, S.A. v. S.S. Gasbras Sul*, 387 F.2d 573, 580 (2d Cir. 1967), *cert. denied*, 391 U.S. 914, 88 (S. Ct. 1808), 20 L. Ed. 2d 653 (1968). (Emphasis added).

Both Louisiana law and general maritime law qualify these doctrines in a manner which is particularly pertinent to the case at bar:

> The doctrine of sudden emergency does not involve a different standard of care than that applied in any other negligence case. **The conduct required is still that of a reasonable person under the circumstances. The emergency is merely a circumstance to be considered in assessing the actor's conduct**.

W. Prosser, *Law of Torts*, Chap. 5, S. 33 at pp. 167-170 (1971)

. . .

> Sudden emergency is certainly no absolute defense and we must still ask the question: was the conduct in question **unreasonable under the circumstances? At most, reference to "sudden emergency, serves to emphasize under the circumstances."**

Martin v. City of New Orleans, 678 F.2d 1321, 1325 (5th Cir. 1982), *rehearing and rehearing en banc denied*, citing *Dean v. Traveller's Insurance Co.*, 171 So. 2d 708, 709 (La. App. 1965). (Emphasis added).

Under the general maritime law:

> . . . this principle [of sudden emergency] must be qualified to the extent that it **does not exculpate all fault**, however flagrant [citations omitted], or obviate the duty of a ship's master to act with a level head [citation omitted]. [citation omitted]

Union Oil Co. of California v. Tug Mary Malloy, 414 F.2d 669, 674 (5th 1969). (Emphasis added).

In the case at bar, it is clear that the trial court took all circumstances into account, including the malfunctioning helicopter engine, in determining that PHI's pilot was negligent.

The trial court specifically found, and the evidence showed, that the PHI pilot was presented with three alternatives, one of them safe: (1) landing the helicopter in the calm waters; (2) returning to the nearby platform about a mile behind; (3)

"stretching" the flight out for the five mile flight to the far away platform. The evidence showed that the first alternative, the water landing, was the **safe and reasonable** alternative. Despite PHI's futile attempts to argue that a water landing was dangerous, after weighting all of the evidence and testimony, the trial court made a factual finding that a water landing soon after the ingestion of the bird "would have resulted in no injury" to Buras. (Petitioner's Appendix B, App. 41).

The trial court found the choice Talley made to have been **unreasonable** under the circumstances. In evaluating the actions that the pilot took, the trial court made the factual determination that the pilot's course of action was so egregious that it violated not only the high standard of care it found applicable to PHI as a common carrier, but also the ordinary standard of care that PHI argued was applicable to itself. (Petitioner's Appendix B, App. 43-45).

Moreover, the pilot was not even faced with a truly dangerous emergency until he chose to continue the flight, rather than making the immediate precautionary landing mandated by the PHI safety manual and FAA procedures. He violated both and decided to push forward with this "sortie" with all of the valor and heroism of a combat pilot, and attempted to land his helicopter on the platform at "Block 65 Bravo." The evidence showed that this alternative became more and more dangerous with each passing second. Literally, with the helicopter's last breath, Talley slammed it onto the platform.

In contrast, as explained by Hynes, immediately after the engine malfunction, Talley had the safe alternative of a soft landing in the waters of the Gulf. Both PHI company policy and FAA procedures required Talley to take this alternative. Furthermore, it was the safe alternative for which Talley had been trained, and one for which his helicopter was properly

equipped (with pop-out flotation devices). Nevertheless, Talley chose the riskiest alternative, one that was **unreasonable under the circumstances** as determined by the finder of fact. According to Mr. Hynes,

> . . . sometimes there is an old timer who's going to toughen it out, so to speak, and take the risk. . . . I don't think you measure how good an airman is by all the risks he takes.

(R. Vol. 3, p. 116).

The trial court rejected the reasons that Talley and the PHI expert gave for stretching the flight to make the platform and not making an immediate and safe precautionary landing. The trial court weighed the evidence and determined that Talley's justifications were irrational and motivated by economic concerns rather than by concerns for the safety of his passengers. Talley testified that landing in the Gulf could be a risky alternative because of the possibility of the helicopter capsizing; he also spoke of the possibility of injury occurring when the passengers were picked up by a boat in the Gulf. Notably, Talley was especially susceptible to these *de minimis* hazards because he was the only person in the helicopter not wearing a mandatory life vest. The trial court also saw Talley impeached with prior, inconsistent deposition testimony when he attempted to exaggerate these "risks" associated with a water landing. Talley noted that the passengers could have been scraped by barnacles. This statement, along with PHI's suggestion to the trial court that there was also a risk of shark attack, sharply contrasts with the high risks associated with Talley's actual behavior. By stretching out the flight, he risked total engine failure and, of course, a crash of a much greater magnitude than actually occurred when he slammed the helicopter onto the platform. Barnacle scrapes and the minuscule risk of shark bites pale by comparison to the severe injuries actually sustained by Mr. Buras.

The trial court made the following factual findings based upon the evidence and testimony:

> The pilot chose to continue the flight and attempt a landing on Block 65-B due to fears for his own safety involving a retrieval from water and out of a concern for the economic impact to his employer from putting the helicopter down in the water;
>
> Concern for the safety of his passengers played no part in the decision making process of the pilot in this matter; . . .

(Petitioner's Appendix B, App. 44).

The trial court continued with its findings of fact:

> The pilot owed a duty to his passengers to exercise a high degree of care for their safety. He failed to do so and chose a dangerous course of conduct which caused harm to one of his passengers rather than choosing a reasonable and alternative course of conduct which, in all probability, would have avoided injury to his passenger;
>
> Even if the pilot owed his passenger only an ordinary standard of care, his conduct violated that standard.

(Petitoner's Appendix B, App. 44-45).

PHI argued to the trial court that the pilot's actions were reasonable and viable options under the circumstances. The court found its arguments valid **only** if saving the helicopter was the primary consideration, and not if it was to ensure passenger safety. (Petitioner's Appendix B, App. 42-43).

PHI made the same arguments to the Court of Appeal that it makes in its writ application. The Court of Appeal specifically addressed PHI's arguments concerning the "sudden emergency" doctrine on pages 10-11 of its decision. It ultimately concluded that:

> Based on these facts, we cannot say that the trial court was manifestly erroneous when it determined that Mr. Talley's actions were not reasonable under the circumstances. The decision to continue flying, which was a reasonable one when the problem occurred over enemy territory in Viet Nam where there was no viable alternative, was **not reasonable** under the conditions existing in the Gulf of Mexico on September 20, 1988. The record supports the trial court's decision that PHI breached the standard of reasonable care under the circumstance that it owed to its passengers when its pilot elected not to make a precautionary landing in the water. We find, therefore, that the first and second errors assigned by PHI are without merit.

(Petitioner's Appendix A, App. 13-14). (Emphasis added).

In short, under the "sudden emergency" doctrine, Talley's conduct did not conform to the applicable standard of care. It was not a reasonable exercise of current standards of [pilot] knowledge and skill under the circumstances. *See Employers Insurance of Wausau*, 866 F.2d at 772. There was no "judgment call" as suggested by PHI. Hynes expressed his expert opinion in concluding that Talley had **one** safe choice and did not make it, even though Talley's training should have directed him toward that choice, and even though the rules in the PHI manual and the FAA procedures should have directed him toward that choice. Hynes clearly testified that Talley did not exercise sound

aeronautical decision-making. (R. Vol. 3, p. 116). In short, Talley's actions were cavalier and imprudent.

Although PHI may have provided expert testimony to the contrary, the decision to resolve the conflicting testimony in favor of Buras was a finding of fact made by the trial court and cannot be disturbed. PHI's argument is thus without merit.

CONCLUSION

Contrary to PHI's assertions, the "sudden emergency" doctrine does not serve to automatically exculpate a pilot from all responsibility for negligent and unreasonable actions simply because an emergency situation is encountered. The emergency is merely a circumstance to be considered in assessing the pilot's conduct. This is exactly what was done by the trial court and the Louisiana Fourth Circuit Court of Appeal.

PHI attempts to divert this honorable Court's attention from the real facts of this case and from the trial court's well reasoned factual findings and inferences. The trial court saw and heard contradictory evidence and decided the facts pertinent to the instant matter in Buras' favor. The trial court simply saw a plaintiff whose life was destroyed by a reckless pilot. Those are the **real facts** of this case. PHI emphatically dislikes the trial court's findings and its decision based upon these facts. However, this dislike obviously does not warrant this Court granting a writ of certiorari.

Respectfully submitted,

PHILIP F. COSSICH, JR.
Counsel of Record
DARREN D. SUMICH
COSSICH, MARTIN
& SUMICH, L.L.C.
8056 Highway 23, Suite 200
P.O. Box 400
Belle Chasse, Louisiana 70037
(504) 394-9000

ST. MARTIN & WILLIAMS
MICHAEL X. ST. MARTIN
3373 Little Bayou Black Drive
P.O. Box 2017
Houma, Louisiana 70361-2017
(504) 876-3891

Attorneys for Respondent